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IN THE
COURT OF APPEALS OF INDIANA

JOHN O. PHILBECK,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 06A05-0702-PC-105
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0605-PC-61

August 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner John O. Philbeck appeals from the denial of his petition for post-conviction relief. Specifically, Philbeck argues that the post-conviction court erroneously concluded that the consecutive habitual offender enhancements imposed by the trial court were not illegal. Finding that Philbeck's sentence is illegal but that he is entitled to no relief because he pleaded guilty and benefited from the guilty plea, we affirm the judgment of the post-conviction court.

FACTS

In 2001, Philbeck was serving multiple sentences in the Department of Correction. On June 20, 2001, the State Police received a report that Boone County officials had received four threatening letters from Philbeck. As a result, on October 29, 2001, the State charged Philbeck with four counts of class D felony intimidation and with being a habitual offender.

On October 30, 2001, Philbeck pleaded guilty to one count of class D felony intimidation and to being a habitual offender in exchange for the dismissal of the remaining charges. The trial court sentenced Philbeck in accordance with the plea agreement, which provided that Philbeck would receive a three-year sentence and a three-year enhancement for being a habitual offender, for a total sentence of six years. Additionally, in accordance with the plea agreement, the trial court ordered the six-year sentence to be served consecutively to the sentence being served by Philbeck in Cause Number 06D01-9703-DF-17, which also

included a habitual offender enhancement and had been ordered to be served consecutively to another sentence including a habitual offender enhancement.[1]

Philbeck did not take a direct appeal. Instead, on May 12, 2006, he filed a pro se petition for post-conviction relief, which was later amended by counsel. Among other things, the amended petition argued that the imposition of consecutive habitual offender enhancements was illegal. Following an evidentiary hearing, on December 27, 2006, the post-conviction court denied Philbeck's petition and found, in pertinent part, as follows:

> 4. By pleading guilty pursuant to a plea agreement defendant avoided exposure to a potential [sentence that was] six (6) years longer than the one he actually received.
>
> CONCLUSIONS OF LAW
>
> 1. The sentencing Court lacked statutory authority to impose an enhanced sentence consecutive to a previously enhanced sentence, however, by entering into the plea agreement, defendant received a significant benefit in that three other felonies were dismissed.
>
> 2. "A defendant may not enter into a plea agreement calling for an illegal sentence, benefit from that sentence and then later complain that it was an illegal sentence." Lee v. State[,] 816 N.E.2d35 [sic] (Ind.2005 [sic]). . . .

Appellant's App. p. 41-42. Philbeck now appeals.

DISCUSSION AND DECISION

As we evaluate Philbeck's challenge to the denial of his petition for post-conviction relief, we observe that the petitioner in a post-conviction proceeding bears the burden of

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[1] We are handing down an opinion in that cause contemporaneously with this one. Philbeck v. State, No. 06A01-0702-PC-91 (Ind. Ct. App. Aug. 16, 2007). In that matter, we conclude that the consecutive habitual offender enhancements are illegal and reverse and remand with instructions to revise the sentencing order accordingly. Slip op. at 6.

establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

It is well established, as conceded by the post-conviction court, that there is no statutory authority for habitual offender enhancements to be served consecutively to one another. I.C. § 35-50-2-8. Even more compelling, our Supreme Court has explicitly instructed that consecutive habitual offender enhancements are contrary to "the rule of rationality and the limitations in the constitution" and "the moral principle that each separate and distinct criminal act deserves a separately experienced punishment." Starks v. State, 523 N.E.2d 735, 736-37 (Ind. 1988). Therefore, consecutive habitual offender enhancements are illegal, and remain illegal even if a petitioner's sentences are statutorily required to be served consecutively. Smith v. State, 774 N.E.2d 1021, 1023-24 (Ind. Ct. App. 2002). Generally, the proper remedy for a defendant who receives consecutive habitual offender enhancements

is to order that the enhancements be served concurrently with one another. Starks, 523 N.E.2d at 737.

Because Philbeck was ordered to serve consecutive habitual offender enhancements, it is undisputed that his sentence is illegal.[2] Inasmuch as he pleaded guilty, however, our inquiry into whether he is entitled to relief does not end there. Our Supreme Court has held that cases in which a petitioner seeks relief after entering into a plea agreement calling for a fixed, illegal sentence will fall into one of three categories: (1) the illegal sentence rendered the plea involuntary; (2) the plea was voluntary but the petitioner did not benefit from the illegal sentence; and (3) the plea was voluntary and the petitioner benefited from the illegal sentence. Lee v. State, 816 N.E.2d 35, 39-40 (Ind. 2004). The proper remedy for cases in the first category is to allow the petitioner to withdraw his plea. Id. at 39. The proper remedy for cases in the second category is to sever the illegal sentencing provision from the plea agreement and remand the cause with instructions to enter a legal sentence. Id. at 40. There is no remedy for cases in the third category. Id.

Philbeck does not argue that his guilty plea was involuntary. Instead, he contends that his case falls into the second category because, according to him, he did not benefit from the illegal sentence. Absent his plea agreement, Philbeck could have been sentenced only on the four counts of intimidation. See Starks, 523 N.E.2d at 736-37. Philbeck argues that the four counts of intimidation constitute a single episode of criminal conduct. The aggregate

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[2] The State acknowledges that we are bound by Starks. It suggests, however, that "that decision should be revisited." Appellee's Br. p. 6. Inasmuch as we have no authority to "revisit" opinions handed down by our Supreme Court, we decline this invitation.

sentence for multiple counts of class D felony intimidation committed during a single episode of criminal conduct is limited to four years, the presumptive term for a class C felony. Ind. Code § 35-50-1-2. The State, on the other hand, argues that these four charges constitute four separate episodes of criminal conduct; as such, Philbeck faced a maximum sentence of twelve years—four consecutive sentences of three years each—and benefited from the six-year sentence called for by the plea agreement. I.C. § 35-50-2-7(a).

An "episode of criminal conduct" means "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b). Offenses need not be committed simultaneously or contemporaneously with one another to be part of a single episode of criminal conduct. Harris v. State, 861 N.E.2d 1182, 1188 (Ind. 2007). The determination should be made based on the "unambiguous and straightforward" language of the statute. Reed v. State, 856 N.E.2d 1189, 1199 (Ind. 2006).

Philbeck did not introduce the four letters into evidence at the post-conviction hearing. Consequently, the only evidence regarding the letters' timing is in the probable cause affidavit, in which Lieutenant Jeffrey W. Heck attested as follows:

> On June 20, 2001[,] I was contacted by the Boone County Prosecutor's Office regarding threatening letters that county officials had received. On that date I met with Prosecutor Buchanan who provided me with letters sent to Boone Superior II Judge James Detamore, Karen Galvin [of the] Boone County Probation Department, and Boone Circuit Judge Steve David. On the following day I received a letter sent to Deputy Prosecutor Bruce Petit . . . . The letters were sent from the Wabash Valley Correctional Facility[,] Carlisle, Indiana. Each of the letters had a return address [indicating that Philbeck had sent it]. In each of the letters the author threatens that the recipient and their family will be killed.

PCR Ex. A at 1. This evidence does not enable us to construct a timeline indicating when Philbeck mailed the letters. To the contrary, it establishes only when the State Police received notice of Philbeck's letters. It is entirely possible that the recipients had been holding onto the letters for days, weeks, or months, and that they had received them at entirely different times. We simply cannot tell. Under these circumstances, Philbeck has failed to establish that the evidence as a whole unerringly and unmistakably leads to a conclusion that these offenses constituted a single episode of criminal conduct. Consequently, we must conclude that the post-conviction court did not err by determining that Philbeck benefited from the plea agreement and, notwithstanding the admittedly illegal sentence contained therein, is not entitled to any relief.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and VAIDIK, J., concur.